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BEFORE THE
SURFACE TRANSPORTATION BOARD

WESTERN FUELS ASSOCIATION, INC., and BASIN ELECTRIC POWER COOPERATIVE **Complainants,** **v.** **BNSF RAILWAY COMPANY** **Defendant.**	**Docket No. 42088**

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BNSF'S MOTION TO STRIKE PORTIONS OF WFA/BASIN'S REPLY TO COMMENTS OF BNSF RAILWAY COMPANY ON REMAND

On March 18, 2011, complainants Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. ("WFA/Basin") filed Complainants' Reply to Comments of BNSF Railway Company on Remand ("Reply Remand Comments"). The Reply Remand Comments included an Argument and Verified Statements of Professor George Borts and Thomas D. Crowley.

BNSF hereby requests under 49 C.F.R. §1104.8 that the Board strike from the record the portion of complainants' Argument at pages 34-37 under the heading "Hypothetical Examples" and pages 19-41 of the Verified Statement of Mr. Crowley. As explained below, this material constitutes an impermissible collateral attack on the principles announced in *Major Issues in Rail Rate Cases*, Ex Parte No. 657 (Sub-No.1) (STB served Oct. 30, 2006) ("*Major Issues*") to govern the allocation of through revenue on cross-over traffic.

In *Major Issues*, the Board found that the fundamental objective in allocating revenue on cross-over traffic is to ensure that cross-over traffic is used in stand-alone cost ("SAC") analyses only to simplify the SAC analysis, and not to distort or change the results of a full SAC analysis done without the simplifying device of cross-over traffic. To achieve simplification without distortion, the Board concluded that revenue on through movements should be allocated to the stand-alone railroad ("SARR") and the residual incumbent in direct proportion to the defendant's on-SARR and off-SARR costs, using the defendant's average total costs on the on-SARR and off-SARR segments to reflect full costs, including the effects on costs of economies of density. The Board concluded that the Average Total Cost ("ATC") methodology implemented these principles.

The validity of the principles adopted by the Board in *Major Issues* to govern the allocation of revenue on cross-over traffic is not at issue in this remand proceeding. When the Board adopted the revenue allocation methodology that is at issue here – Modified ATC – it did not repudiate the principles announced in *Major Issues* to govern revenue allocation on cross-over traffic. The Board adopted Modified ATC to address a perceived problem with the application of the ATC methodology to certain low-rated traffic, not because the Board had concluded that the principles governing the proper allocation of revenue on cross-over traffic, adopted in a major rulemaking proceeding and approved by the United States Court of Appeals for the District of Columbia Circuit, were invalid. The issue that BNSF has raised in this remand proceeding is whether Modified ATC can be justified when measured against the principles adopted by the Board in *Major Issues*, since those are the principles that determine whether cross-over traffic is being properly used as a simplifying device in a SAC analysis.

The Board should strike WFA/Basin's argument and evidence in the above-referenced sections of their Reply Remand Comments because those materials directly challenge the principles announced in *Major Issues*. WFA/Basin's argument is that the cost-based revenue allocation principles adopted in *Major Issues* are flawed because they fail to recognize that high-density SARRs are inherently more "profitable" than low-density off-SARR line segments. In effect, WFA/Basin argue that complainants *should* be able to use cross-over traffic on high-density lines to skew SAC results in their favor because a high-density SARR would be more "profitable" than a SARR that also included the far-flung low-density lines needed to complete the transportation service.

The claim that a high-density SARR should be favored in the revenue allocation process is directly contrary to the cost-based revenue allocation principles adopted in *Major Issues*. The Board has already stated in this proceeding that the parties "may not collaterally attack the new procedures adopted in *Major Issues* in this case." *Western Fuels Association, Inc. v. BNSF Railway Co.*, STB Docket No. 42088, slip op. at 5 (STB served February 18, 2009) ("*February 2009 Decision*"). Moreover, the specific argument made by WFA/Basin here has been made before and the Board definitively rejected it in *Major Issues*. If WFA/Basin wish to have the Board reconsider the principles that were adopted in an industry-wide rulemaking proceeding, they must seek to do so through a reopening of *Major Issues*. WFA/Basin cannot collaterally attack the principles announced in *Major Issues* in this case.

BACKGROUND

BNSF explained in the Background section of its November 22, 2010 Comments of BNSF Railway Company on Remand ("BNSF Remand Comments") the circumstances leading to the Board's *February 2009 Decision* and the remand of that decision from the United States

Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") in *BNSF Railway Co. v. Surface Transportation Board*, 604 F.3d 602 (D.C. Cir. 2010), *rehearing and rehearing en banc denied*, No. 09-1092 (Sept. 2, 2010). BNSF also described the mechanics of the procedures for allocating revenues on cross-over traffic under the Board's original ATC methodology, adopted by the Board in *Major Issues*, and under its Modified ATC methodology, applied by the Board in the *February 2009 Decision*. BNSF does not repeat that discussion here but incorporates the Background section of its Remand Comments by reference into this Motion to Strike.

In BNSF's November 22, 2010 Remand Comments, BNSF made three basic arguments in support of its challenge to the Board's use of Modified ATC. First, BNSF argued that by accounting for variable costs in both the first and second steps of the Modified ATC procedure, in effect double-counting variable costs, Modified ATC gave undue weight to variable costs in the revenue allocation process and thereby reintroduced the distortions in SAC analyses using cross-over traffic that the Board had sought to eliminate when it adopted original ATC. Second, BNSF explained why the application of ATC to low-rated traffic did not produce "illogical" results or results that were inconsistent with the Board's prohibition on cross-subsidies. Third, BNSF showed that even if the Board's concerns about how original ATC treated low-rated traffic were valid, there are superior ways of addressing the Board's expressed concern that would preserve the original benefits that ATC was intended to produce with minimal change to the original approach.

In their Reply Remand Comments, WFA/Basin presented several arguments in response to BNSF's Remand Comments. First, WFA/Basin defended the use of a two-step revenue allocation approach in which variable costs are considered twice, claiming that Modified ATC is merely "a corrected version of the DARA two-step revenue allocation procedure." WFA/Basin

Argument at 30. Second, WFA/Basin repeated the Board's concern that the application of original ATC to low-rated traffic produces "illogical" results. *Id.* at 31-34. Third, WFA/Basin argued that in addition to problems that supposedly result from the application of original ATC to low-rated traffic, original ATC also produces inappropriate results on high-rated traffic because original ATC fails to recognize that high-density movements "are inherently more profitable." *Id.* at 34-37. In effect, WFA/Basin defend Modified ATC's double-count of variable costs because it allows high-density SARRs to appear to be more "profitable" on high-rated traffic. Finally, WFA/Basin argued that if the Board were to apply original ATC or the modified form of original ATC described by BNSF in its Remand Comments, "the Board must, at a minimum, give WFA the opportunity to determine whether it can revise its SARR to address the new revenue allocation procedure." *Id.* at 39.

None of WFA/Basin's arguments and assertions in their Reply Remand Comments is valid. However, only one of WFA/Basin's arguments is the subject of this Motion to Strike. At pages 34-37 of WFA/Basin's Argument under the heading "Hypothetical Examples" and at pages 19-41 of the Verified Statement of Mr. Crowley, WFA/Basin argue that original ATC improperly allocates cross-over revenues on high-rated traffic. This argument has nothing to do with the reasons that the Board had for abandoning original ATC, which were focused on the treatment of low-rated traffic under original ATC. More important, this argument, and the factual claims made to support it, are an impermissible collateral challenge to the Board's conclusion in *Major Issues* that cross-over traffic is supposed to be used in SAC analyses only to simplify the analysis. The argument also directly challenges the cost-based revenue allocation principles that promote simplification that were adopted by the Board in *Major Issues.* The Board made it clear in the *February 2009 Decision* in this case that it will not allow parties to bring collateral challenges to principles adopted in *Major Issues* in the context of individual rate cases.

ARGUMENT

Under 49 C.F.R. § 1104.8, the Board has the authority to strike materials of an "objectionable nature," including materials that are "redundant, irrelevant, immaterial, impertinent, or scandalous." The ICC exercised the authority to strike "irrelevant" or "immaterial" matters in circumstances where the evidence or argument related to issues that had already been decided in a case and therefore were no longer in dispute. *See McCarty Farms, et al. v. Burlington Northern Inc.*, Case No. 37809, 1987 WL 98562, at *2 (1987) (striking statements improperly containing evidence on issues that had already been addressed in prior orders). The Board has also used its authority under 49 C.F.R §1104.8 to strike statements raising "issues that are outside the scope of [the] proceeding." *James Riffin D/B/A The Northern Central R.R. – Acquisition and Operation Exemption – in York County, Pa.*, STB Fin. Docket No. 34501 *et al.*, at 4 (STB served Feb. 23, 2005).[1]

The Board should strike the materials at pages 34-37 of WFA/Basin's Argument under the heading "Hypothetical Examples" and at pages 19-41 of the Verified Statement of Mr. Crowley from the record because, as explained below, they constitute a collateral challenge to

[1] In addition, where arguments or evidence are raised for the first time in a responsive pleading and the other party does not have a chance to respond, the Board may strike such arguments. *See, e.g., Otter Tail Pwr. Co. v. BNSF Ry. Co.*, STB Fin. Docket No. 42071, slip op. at 4 (STB served on Jan. 27, 2006) (striking evidence offered for the first time on rebuttal where opposing party had no opportunity to respond).

issues that have already been decided by the Board in *Major Issues* and therefore are outside the scope of this proceeding.[2]

I. WFA/Basin's Argument About Original ATC Is An Improper Challenge To The Revenue Allocation Principles That The Board Announced In *Major Issues*.

The Board's decision on cross-over traffic revenue allocation in *Major Issues* was the culmination of years of debate over the principles and framework that should be applied in allocating revenue between a SARR and the residual incumbent in a SAC analysis. As BNSF explained in its Comments on Remand, the Board determined in *Major Issues* that a successful revenue allocation methodology would need to be based on three premises.

First, the purpose of allowing cross-over traffic in SAC analyses is "to make the analysis more manageable without introducing bias." *Major Issues*, slip op. at 24. The Board concluded that bias would be created if the use of cross-over traffic produced SAC results that differed from the results of a SAC analysis that did not use cross-over traffic. "[T]he goal in allocating revenue from cross-over traffic should be to ensure that a truncated SAC analysis using cross-over traffic will approximate the outcome of a full SAC analysis." *Id.*

Second, to achieve simplification without biasing the SAC results, "[a] successful allocation of cross-over revenues would produce the same revenue-to-cost relationship [on the SARR] as would be produced if the complainant modeled the entire movement." *Id.* at 35. Thus, the SARR should receive revenues in direct proportion to the SARR's share of the defendant's average total costs on the through movement. *Id.* at 25. In the *February 2009*

[2] BNSF has asked the Board to strike the offending materials rather than seeking leave to file a reply because BNSF does not believe that the merits of WFA/Basin's arguments in the challenged sections of WFA/Basin's Reply Remand Comments are a proper subject of this proceeding. If WFA/Basin believe that there is a valid basis for revisiting the cost-based revenue allocation principles announced in *Major Issues*, the proper avenue for addressing WFA/Basin's arguments would be to seek a reopening of *Major Issues*.

Decision, the Board acknowledged that "[t]he objective [of revenue allocation] is to reflect, to the extent practicable, the defendant carrier's relative costs of providing service over each of the two segments." *February 2009 Decision* at 12.

Finally, any assessment of defendant's costs must reflect economies of density, which is a "defining characteristic of the railroad industry." *Id.* at 25. Moreover, "any approach that seeks to account for economies of density must examine the average total costs, rather than the average variable costs." *Id.* at 34.

The Board concluded in *Major Issues* that the original ATC methodology met these requirements. As the Board explained to the D.C. Circuit in defending original ATC, original ATC provides "an unbiased, cost-based revenue allocation method that will fairly account for economies of density and diminishing margins thereto." Joint Brief of Respondents, *BNSF Railway Co. v. Surface Transportation Board*, Docket Nos. 06-1372, 06-1373, 06-1374, 06-1398, 06-1399, 06,1401, 06-1404, 06-1409, 06-1421, at 42 (D.C. Cir.) (filed Jan. 8, 2008).

When the Board adopted Modified ATC and applied it in the *February 2009 Decision* in this case, the Board did not repudiate the principles adopted in *Major Issues*, namely that revenue on cross-over traffic should be allocated based on relative on-SARR and off-SARR costs in order to promote simplification without bias, or that the determination of on-SARR and off-SARR costs needs to be based on average total costs in order to properly reflect economies of density. Indeed, the Board had just finished successfully defending those principles from attack by shippers, including WFA/Basin, before the D.C. Circuit. *See BNSF Railway Co. v. Surface Transportation Board*, 526 F.3d 770, 783 (D.C. Cir. 2008). Rather, the Board adopted Modified

ATC because of a perceived problem with the way original ATC allocated revenue on certain low-rated traffic.[3]

A. The Arguments And Evidence BNSF Seeks To Have Struck Constitute A Direct Challenge To The Cost-Based Revenue Allocation Principles Adopted In *Major Issues.*

In the materials that are the subject of this Motion to Strike, WFA/Basin ask the Board to repudiate the cost-based revenue allocation principles announced in *Major Issues*. WFA/Basin's argument in those sections of their Reply Remand Comments is that the allocation of revenues on cross-over traffic based on the defendant's on-SARR and off-SARR average total costs, the principle underlying original ATC, understates the amount of revenue that a high-density SARR should receive on high-rated traffic. WFA/Basin's premise is that high-density portions of a through movement are more "profitable" than low-density portions of a movement, and therefore high-density SARRs should be favored with more revenue in the revenue allocation process than is allocated in the cost-based approach adopted by the Board in *Major Issues*. *See* WFA/Basin Argument at 36-37. In other words, WFA/Basin argue that the SARR should not receive revenues in direct proportion to its share of total costs – the central premise in *Major Issues* – because such a cost-based approach fails to recognize the inherent profitability of high density lines.

WFA/Basin does little to hide its frontal attack on the cost-based allocation principles announced in *Major Issues*:

- "Original ATC subverts the fact that high density lines are more profitable on a per-unit basis than low density lines, contradicting the economies of density inherent in highly utilized assets. . . ." WFA/Basin Argument at 36.

[3] BNSF addressed the Board's concern with the treatment of low-rated traffic under original ATC in BNSF's Remand Comments.

- "[Under Original ATC,] the high density SARR is allocated less profit than the low density residual incumbent after total costs have been recovered by both segments. This result cannot be squared with basic economic principles because it assumes a lower density line is more profitable for the carrier to operate than a higher density line." *Id.* at 37.

The Verified Statement of Mr. Crowley expands on this argument:

- "[T]he impact of economies of density is vastly overstated in the Original ATC formula." Crowley V.S. at 24.
- "Original ATC serves to essentially eliminate access to high R/VC movements for any SARR that incorporates high-density segments." *Id.*
- "For every move where revenue-to-cost is above that level (i.e., higher revenue movements), Original ATC under-allocates to the SARR." *Id.* at 25.
- "Original ATC produces absurd results by making low density lines more profitable on a per ton basis than high density lines." *Id.* at 28.
- "Original ATC produces per unit profits that do not comport with actual railroad economics." *Id.* at 31.
- "For high-R/VC movements, Original ATC systematically over allocates revenues to the low-density segment." *Id.* at 35.
- "The application of Original ATC clearly has the effect of restricting the SARR from access to real-world high-R/VC movements, and improperly diverting the revenues on those movements to the residual incumbent." *Id.* at 39.
- "[T]he Original ATC results are nonsensical as they allocate more profit (revenue in excess of total cost) to the lower density segment, which, as discussed above, is contrary to economic principles." *Id.* at 41.

The argument is a broadside challenge to the Board's adoption of original ATC in *Major Issues*. Indeed, WFA/Basin argue that Modified ATC is justified precisely because it does *not* follow the cost-based revenue allocation principles that led the Board to adopt original ATC in *Major Issues*. As reflected in the quotes set out above, WFA/Basin's argument is that original ATC was flawed because it allocates revenue in direct proportion to total costs and thereby fails to recognize that high density lines are more "profitable." WFA/Basin defend the Board's decision to use Modified ATC in the *February 2009 Decision* because "Modified ATC corrects this error with Original ATC." WFA/Basin Argument at 37. In effect, WFA/Basin argue that Modified ATC "corrects" original ATC by giving variable costs more weight in the revenue allocation process and thereby allocates more revenue to the SARR than is justified by the SARR's portion of average total costs.

The central objective of the Board in *Major Issues* was to preserve the "same revenue-to-cost relationship [on the SARR] as would be produced if the complainant modeled the entire movement," *Major Issues*, slip op. at 35, which the Board concluded was critical to the use of cross-over traffic as a simplification measure that did not bias the results. WFA/Basin defend Modified ATC precisely because it does *not* allocate revenue to the SARR in direct proportion to the SARR's total cost, as illustrated by the examples described by Mr. Crowley in WFA/Basin's Reply Remand Comments.

B. WFA/Basin's Examples Illustrate WFA/Basin's Opposition To The Cost-Based Revenue Allocation Principles Adopted In *Major Issues*.

The Crowley V.S. sets out at pages 19-41 a series of examples that are intended to demonstrate why it was inappropriate for the Board to adopt a revenue allocation approach that allocated to the SARR revenues in direct proportion to the SARR's percentage of total cost. Two examples suffice to show that the WFA/Basin arguments are a direct challenge to the principles that the Board relied on in adopting ATC in *Major Issues*.

Table 3 at page 23 of the Crowley V.S. and the accompanying argument purport to show that original ATC gives too much weight to fixed costs on high revenue movements. The result, according to Mr. Crowley, is that low-density lines with high fixed costs receive too much revenue under original ATC. Table 3 is based on a movement whose costs are 25% fixed and 75% variable. Line 1 of Table 3 shows that original ATC preserves the 25-75 split between fixed and variable costs at all revenue levels. As shown on Line 1, because fixed costs account for 25% of total cost, fixed costs are given a 25% weight in allocating revenue regardless of the level of revenue. Table 3 shows that original ATC allocates revenue in direct proportion to total cost, preserving the relative weight of fixed and variable costs in making the revenue allocation.

WFA/Basin challenge this result, claiming that it overlooks the fact that fixed costs are a smaller percentage of the total revenue as revenues increase. The argument is nonsensical. While fixed cost declines as a percentage of total revenue as revenues increase, variable cost also declines as a percentage of total revenue as revenues increase. For example, in the Table 3 scenario of a movement generating revenue of 250% of total cost, fixed cost is 10% of total revenue even though it is 25% of total cost, but variable cost is only 30% of total revenue (75/250) even though it is 75% of total cost. Under WFA/Basin's logic, fixed cost is over-weighted under original ATC by 150% (Line 4) but variable cost is also over-weighted by the same amount -- 150% (75%/30% - 1 x 100). WFA/Basin would have the Board believe that only fixed costs are over-weighted. But the example shows that when costs are considered as a percentage of revenues, both fixed costs and variable costs are over-weighted and they are over-weighted to the same extent. The example, in fact, shows that original ATC works as intended. Original ATC properly gives fixed cost 25% weight in the revenue allocation process because fixed cost is 25% of total cost. Original ATC gives fixed costs the proper weighting regardless of the amount of the revenue generated on the movement.

Table 7 also reflects a direct challenge to the approach adopted in *Major Issues* that revenues should be allocated in direct proportion to total costs. Table 7 purports to show that a cost-based revenue allocation deprives high-density SARRs of an appropriate share of profits. The example involves a movement with an R/VC ratio of 2.20. The SARR's share of total cost is 45.5%. Under original ATC, the SARR therefore receives 45.5% of the through revenue. Consistent with the principles in *Major Issues*, the SARR receives revenues in direct proportion to its share of total cost.

Again, WFA/Basin challenge this result, arguing that the SARR should receive a larger revenue division to reflect the fact that the SARR's high-density lines are "inherently more profitable." WFA/Basin Argument at 37. Line 8 of Table 7 identifies the SARR's "profit" under original ATC, i.e., the amount of revenue it receives in excess of its total costs. Line 9 sets out the Residual Incumbent's "profit." WFA/Basin complain that the Residual Incumbent's "profit" is larger than the SARR's, i.e., Line 9 is larger than Line 8. But Table 7 focuses on the dollar amount of "profit" rather than "profit" as a percentage of revenue above cost. In fact, the profit margin in percentage terms is identical on both segments -- 37.5% of the revenue allocated to each segment is "profit," i.e., revenue above cost. (Line 9/Line 6 and Line8/Line 5). The evenhandedness of original ATC is apparent. Each segment of the movement shares the "profits" generated on the movement in direct proportion to the segment's share of total costs. WFA/Basin's argument is that high-density SARR's *should* be favored in the revenue allocation process with a revenue share that reflects a higher profit margin than revenues allocated to low-density off-SARR lines. But that argument is flatly at odds with the approach adopted in *Major Issues* that revenues should be allocated in direct proportion to total costs.[4]

[4] WFA/Basin's argument in Table 7 and elsewhere in the Reply Remand Comments that Modified ATC is justified because it gives more weight to variable costs and therefore provides high-density SARRs with a disproportionate amount of revenues relative to the SARR's share of total costs actually supports BNSF's position on remand that Modified ATC improperly reintroduces the bias in revenue allocation that the Board sought to eliminate when it adopted a cost-based revenue allocation methodology in *Major Issues*. Nevertheless, BNSF is asking that the Board strike the argument altogether because WFA/Basin is essentially asking the Board to repudiate principles announced in *Major Issues*, and that is not a proper subject in this case.

II. WFA/Basin Have Impermissibly Brought A Collateral Challenge To *Major Issues*.

The Board has made it clear that it will not consider collateral challenges to *Major Issues* in the context of individual rate cases. Indeed, in the *February 2009 Decision* in this case, the Board criticized BNSF for what the Board considered to be a collateral challenge to principles announced in *Major Issues*. The Board said:

> BNSF may not collaterally attack the new procedures adopted in *Major Issues* in this case. Those changes were the product of an elaborate rulemaking with public comment from numerous interested parties. BNSF had a full opportunity to participate in that rulemaking, and to challenge those aspects of the new rules in court. It would defeat the purpose of that rulemaking if parties were permitted to advocate for different rules in individual rate cases.

February 2009 Decision, slip op. at 5.

WFA/Basin also had a full opportunity to address the cost-based revenue allocation principles that led the Board to adopt original ATC in *Major Issues*. WFA/Basin had an opportunity to challenge those principles both in the *Major Issues* proceeding and in a challenge to the *Major Issues* rules in court. Indeed, as discussed below, WFA/Basin and other shippers did in fact make the same argument that WFA/Basin make here that the cost-based allocation approach reflected in original ATC inadequately compensates a high-density SARR. As explained below, the Board rejected the argument in *Major Issues*, and WFA/Basin should not be allowed to renew the argument here.

III. WFA/Basin's Arguments In Favor of Modified ATC Are A Reprise Of Arguments That The Board Has Already Rejected.

After the Board adopted original ATC in *Major Issues*, a group of coal shippers that included WFA/Basin challenged original ATC before the D.C. Circuit. The shippers argued, among other things, that "[t]he arbitrary ATC calculations produce biased results. Specifically, ATC appears to be designed and intended to insure mathematically that in cases where short, high-density SARR's interchange with longer, lower-density residual incumbent lines, an arbitrary, disproportionate share of line-haul revenues will be allocated to the residual incumbent." Joint Reply Brief for Shipper-Petitioners, *BNSF Railway Co. v. Surface Transportation Board*, Docket Nos. 06-1372, 06-1373, 06-1374, 06-1398, 06-1399, 06,1401, 06-1404, 06-1409, 06-1421, at 6 (D.C. Cir.) (filed Jan. 14, 2008).

The shippers' appellate argument relied on the testimony of Professor Borts, who in the proceeding below had addressed "the anomaly of allocating less revenue to track segments that experience heavier utilization. . . . All other things being equal, the more traffic moving on the segment, the less revenue it receives from the ATC formula, because the fixed cost component of ATC declines with the volume of traffic. It is hard to believe that a well-run enterprise would allocate more resources to its least used facilities. . . ." Rebuttal Verified Statement of George H. Borts, in the Joint Rebuttal Comments of Western Coal Traffic League et al., *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1) at 6-7 (filed June 30, 2006).

As noted above, WFA/Basin make the same argument here: "For high-R/VC movements, Original ATC systematically over allocates revenues to the low-density segment." Crowley V.S. at 35. "Original ATC produces absurd results by making low density lines more profitable on a per ton basis than high density lines." *Id.* at 28. Mr. Crowley's theory is that high-density lines are more profitable to real world railroads than low-density lines, so a SARR should be able to replicate the high-density lines without being encumbered by the burden of the less profitable, low-density lines of the residual incumbent. As Mr. Crowley puts it, the SARR in this case "replicates, in part, what could be considered the most profitable (on a per-unit basis) segment of BNSF's system. However, the methodology BNSF endorses (Original ATC) serves to transfer the inherent profitability of this high-density segment to less profitable low-density segments, thereby robbing the SARR of the very scale economies that incented BNSF to heavily invest in PRB facilities in the first place." *Id.* at 29-30.

After years of litigation over the proper approach to allocating revenue on cross-over traffic, the Board definitively rejected in *Major Issues* the argument made by Mr. Crowley here, and made on several occasions in the past by coal shippers, that complainants in SAC cases should be able to take advantage of cross-over traffic on high-density SARRs to improve their SAC results. Shippers have repeatedly argued that they should be able to ignore the costs associated with low-density off-SARR lines that they choose not to build and base their SAC analyses only on the more profitable, high-density segments of a defendant's rail network. Shippers have never been pleased with the simplification rationale for the use of cross-over traffic that the Board unambiguously endorsed in *Major Issues* – that cross-over traffic is supposed to simplify SAC analyses without changing the results of a SAC analysis that would include all of the facilities needed to provide the transportation for the SARR shipper group, including the fixed costs of low-density lines. WFA/Basin's argument in this case makes it clear that shippers are still not ready to accept that rationale. But if they believe that the Board should revisit that issue once again, the proper forum for debate on the issue is a reopening of *Major Issues*. It is not appropriate to raise the issue here.

IV. CONCLUSION

For the reasons set forth above, the Board should strike from the record the portion of complainants' Argument at pages 34-37 under the heading "Hypothetical Examples" and pages 19-41 of the Verified Statement of Mr. Crowley on grounds that this material constitutes an impermissible collateral attack on the principles announced in *Major Issues* to govern the allocation of through revenue on cross-over traffic.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this 7th day of April, 2011, I served a copy of BNSF's Motion to Strike on the following by hand delivery:

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